

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

THOMAS MCKINNON and GERI  
MCKINNON,

2:12-CV-329 JCM (VCF)

## Plaintiffs,

V.

ONEWEST BANK, FSB, et al.,

### Defendants.

## ORDER

Presently before the court is *pro se* plaintiffs Geri and Thomas McKinnon's motion to vacate and for relief from a judgment. (Doc. # 49). Defendants Onewest Bank, FSB *et al.* filed an opposition. (Doc. # 55). Plaintiffs then filed a reply. (Doc. # 57).

19 Also before the court is plaintiffs' motion to alter or amend judgment. (Doc. # 50).  
20 Defendants filed an opposition. (Doc. # 52). Plaintiffs then filed a reply. (Doc. # 54).

21       Lastly, before the court is plaintiffs' emergency motion to report a crime. (Doc. # 53).  
22 Defendants filed an opposition. (Doc. # 56). Plaintiffs then filed a reply. (Doc. # 58).

## I. Procedural History

24 On February 29, 2012, plaintiffs filed the instant case for wrongful foreclosure. (*McKinnon,*  
25 *et. al. v. NDEX West, LLC*, case number 2:12-cv-329-JCM-VCF, Doc. # 1). This is the second  
26 lawsuit between these same parties; it involves the same property and the same alleged wrongful  
27 conduct. Compare *McKinnon, et. al. v. IndyMac Bank F.S.B., et. al.*, case number 2:11-cv-607-KJD-

1 GWF and McKinnon, et. al. v. NDEX West, LLC, case number 2:12-cv-329-JCM-VCF. On January  
 2 23, 2012, United States District Court Judge Dawson entered an order dismissing plaintiffs' first  
 3 lawsuit on the merits. (*McKinnon, et. al. v. IndyMac Bank F.S.B., et. al.*, case number 2:11-cv-607-  
 4 KJD-GWF, Doc. #47). On June 19, 2012, this court dismissed the instant case pursuant to the  
 5 doctrine of claim preclusion. (Doc. # 43.)

6 Plaintiffs filed two motions to obtain relief from the court's order dismissing the action and  
 7 one motion to report a crime. The court will address each motion in turn.

8 **II. Motions**

9       A. Motion to Vacate (Doc. # 49)

10       1. Legal Standard

11       A motion for relief from a judgment or order may be brought if movant can show: (1)  
 12 mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with  
 13 reasonable diligence could not have been discovered in time to move for a new trial; (3) fraud,  
 14 misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment  
 15 has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed  
 16 or vacated; or applying it prospectively is no longer equitable; and (6) any other reason that justifies  
 17 relief. FED. R. CIV. P. 60(b), *see also Backland v. Barnhart*, 778 F.2d 1386, 1388 (1985). Relief  
 18 under exception six requires a finding of "extraordinary circumstances." *Id.* (citing *McConnell v.*  
 19 *MEBA Medical & Benefits Plan*, 759 F.2d 1401, 1407 (9th Cir.1985)). "A motion for reconsideration  
 20 is not an avenue to re-litigate the same issues and arguments upon which the court already has  
 21 ruled." *Brown v. Kinross Gold, U.S.A.*, 378 F.Supp.2d 1280, 1288 (D. Nev. 2005); *see Merozoite*  
 22 *v. Thorp*, 52 F.3d 252, 255 (9th Cir. 1995). "A party cannot have relief under this rule merely  
 23 because he or she is unhappy with the judgment." *Khan v. Fasano*, 194 F.Supp.2d 1134, 1136 (S.D.  
 24 Cal. 2001).

25       2. Analysis

26       Plaintiffs specifically argue that the court's order should be vacated under Federal Rule of  
 27 Civil Procedure 60(b)(2), (3), (4), and (6).

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1                   a.         *Newly discovered evidence*

2                 In order to form a basis for relief from judgment, newly discovered evidence must, *inter alia*,  
 3 be likely to produce a different outcome. *Jones v. Aero/Chem Corp.*, 921 F.2d 875, 878 (9th  
 4 Cir.1990).

5                 Plaintiffs' complaint was dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).  
 6 When examining a complaint for failure to state a claim upon which relief can be granted, the court  
 7 looks only to the sufficiency of the complaint. Thus, the court takes all factual allegations as true and  
 8 does not consider evidence. *See Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949-50 (2009).

9                 Further, plaintiffs' claims were dismissed under the doctrine of claim preclusion. Claim  
 10 preclusion "bars litigation in a subsequent action of any claims that were raised or could have been  
 11 raised in the prior action." *Owens v. Kaiser Foundation Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir.  
 12 2001) (quoting *Western Radio Servs. Co. v. Glickman*, 123 F.3d 1189, 1192 (9th Cir. 1997)).

13                 To the extent that plaintiffs argue that newly discovered evidence warrants relief from this  
 14 court's judgment, evidence is neither relevant nor admissible for a motion to dismiss. Further, no  
 15 new material evidence would impact the court's decision to dismiss the case under claim preclusion.  
 16 Thus, the court finds that relief on this basis is inappropriate.

17                   b.         *Fraud*

18                 "To prevail, the moving party must prove by clear and convincing evidence that the verdict  
 19 was obtained through fraud, misrepresentation, or other misconduct and the conduct complained of  
 20 prevented the losing party from fully and fairly presenting the defense." *De Saracho v. Custom Food  
 21 Machinery, Inc.*, 206 F.3d 874, 880 (9th Cir. 2000). "Federal Rule of Civil Procedure 60(b)(3)  
 22 require[s] that fraud ... not be discoverable by due diligence before or during the proceedings." *Pac.  
 23 & Arctic Ry. and Navigation Co. v. United Transp. Union*, 952 F.2d 1144, 1148 (9th Cir.1991).

24                 Plaintiffs have not met their burden of demonstrating by "clear and convincing evidence" that  
 25 defendants obtained dismissal of this action through "fraud, misrepresentation, or other misconduct  
 26 ..." *De Saracho*, 206 F.3d at 880. The court dismissed this action on the basis of claim preclusion;  
 27 there is nothing on the docket that indicates that plaintiffs were not given an opportunity to present

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1 their case. If anything, plaintiffs were given numerous opportunities to make their case against  
 2 defendants. Thus, any allegation of fraud is unsubstantiated and does not warrant relief on this  
 3 ground.

4                   c.         *Void judgment*

5                 “[A] void judgment is one so affected by a fundamental infirmity that the infirmity  
 6 may be raised even after the judgment becomes final.” *U. Student Aid Funds, Inc. v. Espinosa*,  
 7 130 S. Ct. 1367, 1377 (2010). Generally, a judgment is only void where the court lacked  
 8 jurisdiction. *Id.*

9                 Plaintiffs do not argue that the court lacked jurisdiction. Instead, they argue that the judgment  
 10 is void because they were denied the opportunity to present evidence. The Federal Rules of Civil  
 11 Procedure give courts broad authority to dismiss complaints that fail to state a claim. See FED. R.  
 12 CIV. P. 12(b) and 8(a). Plaintiffs have not shown any fundamental infirmity that would cause the  
 13 judgment to be void. Accordingly, reconsideration on this basis is denied.

14                   d.         *Any other reason that justifies relief*

15                 “In order to bring himself within the limited area of Rule 60(b)(6) a petitioner is required to  
 16 establish the existence of extraordinary circumstances which prevented or rendered him unable to  
 17 prosecute an appeal.” *Martella v. Marine Cooks & Stewards Union, Seafarers Int'l Union of N. Am.*,  
 18 AFL-CIO, 448 F.2d 729, 730 (9th Cir.1971).

19                 Plaintiffs have already had their chance to litigate their case and have not provided the court  
 20 with any reason to afford plaintiffs relief under Federal Rule of Civil Procedure 60(b)(6). As  
 21 discussed, this court dismissed this action under the doctrine of claim preclusion. Plaintiffs argue  
 22 that they were unable to present evidence; however, that is not relevant to the basis upon which this  
 23 court dismissed plaintiffs’ action. Plaintiff have not provided the court with any reason why the  
 24 doctrine of claim preclusion does not apply, thus there appears no reason for the court to afford relief  
 25 on this ground.

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1           B.     Motion to Alter or Amend Judgment (Doc. # 50)2           1.     Legal Standard

3           Under Federal Rule of Civil Procedure 59(e), a party may move to have the court amend its  
 4 judgment within twenty-eight days after entry of the judgment. “Since specific grounds for a motion  
 5 to amend or alter are not listed in the rule, the district court enjoys considerable discretion in granting  
 6 or denying the motion.” *McDowell v. Calderon*, 197 F.3d 1253, 1255 n. 1 (9th Cir.1999) (en banc)  
 7 (per curiam) (internal quotation marks omitted). But amending a judgment after its entry remains “an  
 8 extraordinary remedy which should be used sparingly.” *Id.* (internal quotation marks omitted). In  
 9 general, there are four basic grounds upon which a Rule 59(e) motion may be granted: (1) if such  
 10 motion is necessary to correct manifest errors of law or fact upon which the judgment rests; (2) if  
 11 such motion is necessary to present newly discovered or previously unavailable evidence; (3) if such  
 12 motion is necessary to prevent manifest injustice; or (4) if the amendment is justified by an  
 13 intervening change in controlling law. *Id.*

14           2.     Analysis

15           While the court is not limited to the four situations articulated in *McDowell*; even in its broad  
 16 discretion, the court does not find that amending the judgment is appropriate under these  
 17 circumstances. In the June 19, 2012, order the court dismissed the action on the basis of claim  
 18 preclusion. Plaintiffs have not provided any sufficient basis upon which the court should revisit the  
 19 issue. The court’s order addressed the second lawsuit between the same parties, involving the same  
 20 property, and the same alleged wrongful conduct. There is no reason to believe that new material  
 21 evidence would impact the court’s determination of the applicability of claim preclusion. Thus the  
 22 court does not find that plaintiffs’ case warrants this “extraordinary remedy.” *McDowell*, 197 F.3d  
 23 at 1255 n. 1.

24           C.     Emergency Motion to Report a Crime (Doc. # 53)

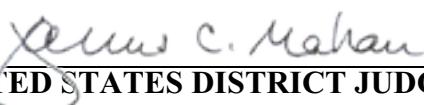
25           Plaintiffs claim that the promissory note relating to their mortgage is a forgery and seek to  
 26 report various crimes pursuant to federal statutes.  
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1        This motion is not proper and the court will not entertain it. Crimes are to be reported to law  
2 enforcement, not to courts. This motion appears to be designed to harass defendants and waste the  
3 time of the court. Plaintiffs are warned that further improper motions of this type will result in the  
4 court ordering plaintiffs to pay the costs and fees incurred by defendants in responding to such  
5 motions.

6 **III. Conclusion**

7        IT IS HEREBY ORDERED, ADJUDGED, AND DECREED the plaintiff's motion to vacate  
8 and for relief from a judgment (doc. # 49), plaintiffs' motion to alter or amend judgment (doc. # 50),  
9 and plaintiffs' emergency motion to report a crime (doc. # 53) be, and the same hereby are, DENIED.

10      DATED September 5, 2012.

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13      **UNITED STATES DISTRICT JUDGE**

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